MSPB & FECA

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Cox v. MSPB, 817 F.2d 100 (Fed Cir. 1987)

An employee whose removal was for cause is not entitled to restoration rights granted employees who are separated as a result of their compensable injury because "by definition, separation as a result of a compensable injury excludes a valid removal for cause unrelated to the employee's compensable injury." The employee's receipt of workers' compensation benefits in itself is not proof that his removal is substantially related to his injury.

Parkinson v. USPS, 55 M.S.P.R. 552 (1992) aff'd after Board remand, 31 F.3d 1177 (Fed.Cir. 1994)

A charge of AWOL cannot stand where the appellant was granted a retroactive award of OWCP compensation, but unrelated charges may nonetheless support his removal.

Carter v. USPS, 75 M.S.P.R. 51 (1997)

Where OWCP decision reversed its earlier one that a job which had been offered to the appellant was suitable, and he had been removed for failure to report for duty in that position, the decision requires reversal of the removal.

However, an agency need not wait for the final Dept. of Labor decision.
In **Bologna v. DoD, 73 M.S.P.R. 100** aff'd, 135 F.3d 774 (Fed.Cir. 1997)

During the claimant's appeal of an OWCP decision, an agency may deny continued leave without pay and place the employee on AWOL, effecting an adverse action based on it, before the final decision. Note that if the result of the DOL appellate process is favorable to the appellant (as in the above case), the AWOL charge will fall, retroactively.

Green v. Army, 55 M.S.P.R. 88 (1992)

Generally, the appellant is entitled to back pay only to the date of his application for restoration, i.e., the date he could first have been restored, not to the date on which OWCP found him recovered.

King v. Navy, 90 M.S.P.R. 341 (2001)

A removal action based on AWOL cannot be sustained when OWCP subsequently determines that the employee was entitled to compensation benefits as a result of a work-related injury for the entire period charged to AWOL. A showing that the appellant was removed for excessive unauthorized

absence and failure to follow instructions provides sufficient nexus to establish Board jurisdiction over a restoration claim, unless she was removed for cause unrelated to her compensable injury. In this regard, the Board noted that an agency may take disciplinary action against an employee based on her failure to follow leave-requesting procedures provided she is on notice of such requirements and of the likelihood of discipline for continued failure to comply.

New v. DVA 142 F.3d 1259 (Fed. Cir. 1998)

OWCP's decisions do not bind the Board, "this is the case only when the Board or the agency acts within its own statutory sphere of authority." Here, "in presuming to pass upon the reasonableness of the [employer's] accommodations, the Board is acting outside its sphere of authority." Such determinations are reserved exclusively to OWCP under 20 C.F.R. § 10.124(c). Thus, the court ruled as a matter of law that when the employee refuses to work in the absence of an OWCP suitability determination as to the job offered, and where her physician has found the job not within her physical limits, a resulting removal is "directly related" to her compensable injury. Accordingly, the Board erred in finding that the appellant's removal for failure to report for duty was unrelated to her compensable injury, so that she was not entitled to restoration rights, where the employing agency offered an accommodated position, but no OWCP suitability determination had been made. The case was remanded for the Board to decide, however, whether the second charge alone (a poor overall attendance record) sufficed as a reason for the removal that was not related to the compensable injury.

Walley v. DVA, 279 F.3d 1010 (Fed.Cir. 2002)

In a slightly different case, when the accommodations correspond to the recommendation of the attending physician, the employee is required to return to duty. No OWCP determination is necessary before the appellant returns if the accommodations are proper.

Morman v. DoD, 84 M.S.P.R. 96 (1999)

Neither FECA nor its implementing regulations provides that a compensably-injured individual is precluded from exercising restoration rights upon recovery merely because her post-injury separation was voluntary.

U.S. Court of Appeals, Federal Circuit
2008-3001
December 31, 2008
The U.S. Court of Appeals, Federal Circuit affirmed the MSPB's dismissal for lack of jurisdiction of the petitioner's appeal regarding accrual of annual and sick leave during time he was in leave without pay status.
The MSPB does not have jurisdiction over appeals regarding the details or circumstances of an employee's restoration after he has partially recovered from a work injury.

McLain v. USPS, 82 M.S.P.R. 526 (1999)

The appellant's work restrictions increased and he was assigned duties he believed were beyond them. He therefore did not report for duty and claimed to have been suspended. Because of an OWCP decision that he had not been provided suitable light duty within his limitations at the time he stopped work, the Board concluded that the appellant had been subjected to the adverse action of suspension.

Sapp v. USPS, 73 M.S.P.R. 189 (1997)

Under 5 C.F.R. § 353.304, an agency is required to make every effort to restore a partially recovered employee. Unlike reasonable accommodation for disabilities, the restoration obligation is not limited to areas serviced by the same appointing authority but extends to the local commuting area regardless of the differing appointing authorities.

Caulton D. Allen v. VA, 2009 MSPB 238 (2009)

Docket No. DC-0752-07-0694-C-3

Interesting discussion of alleged breach of settlement when expunged removal information was shared with OWCP. The agency was not required to expunge documents from agency-maintained files other than the appellant's OPF.

1. *The general rule precludes disclosure of information regarding rescinded adverse actions to third parties when the agency has agreed to provide the employee with a clean record.*
2. *The settlement agreement contains an explicit exception to the general rule precluding disclosure of removal-related information to third parties.*

3. The parties did not intend to preclude disclosure of removal-related information to OWCP.

a. The parties permitted third party disclosures made as required by law.

b. The agency was required by law to truthfully respond to OWCP's request for information regarding the appellant's performance and conduct issues.

c. The parties did not bargain for non-disclosure to OWCP.

Irma Urena v. USPS, 2009 B 228 Docket No. SF-0353-09-0650-I-1

This case involves restoration rights, and contains an important OWCP principle. The supervisor made the following statement: "I have made every reasonable effort to search for and identify operationally necessary tasks for this employee within their current medical restrictions; within their craft; within their regular schedule (tour) and within their current facility. I have been unable to identify adequate available operationally necessary tasks for this employee within these requirements." MSPB held that this was insufficient; that the search must be not just within the facility, but within her commuting area. The same rules apply for FECA; see, for example, FECA Procedure Manual 2-0600.11b.

ECAB

Search ECAB decisions at: http://www.dol.gov/appeals/search/search.htm

S.J. and the Puget Sound Naval Shipyard (Docket 06-2135, on the web at http://www.dol.gov/ecab/decisions/2007/Aug/06-2135.htm) involves a few different issues. One issue addresses a point that needs to be re-emphasized, and that is pointing out that a verbal light duty offer needs to be followed up in writing within two days. Because that did not occur in this case, the Appeals Board reversed the decision and ordered the payment of two months of compensation, up to the point when the job offer was made in writing. A second issue also appears in this case. After the employee began working light duty, he was then suspended for 5 days for "unauthorized absence and continued failure to perform his assigned duties as directed". The Board found that this employee was suspended for disciplinary reasons, and did not involve a withdrawal of light duty for those five days, and upheld the decision of the district office to deny compensation during this 5-day period.

T.L. v. National Security Agency, **Fort Meade, MD**

(Docket # 09-1066, on the Web at http://www.dol.gov/ecab/decisions/2010/Feb/09-1066.htm) involved an employee who sustained an injury in 1998 and was subsequently reemployed in a limited duty position due to the injury. In 2005, the employee was removed due to misconduct ("failing to act in a professional manner, failing to be respectful towards management and failing to follow instructions"), but the employee argued that the agency removed her due to the work-related condition. OWCP denied the employee's claim for compensation and found that the employee was removed for cause rather than inability by the employing establishment to accommodate the restrictions. In affirming the decision, the Board found that the employee did not establish a recurrence of the disability, and the agency's "withdrawal" of limited duty due to misconduct does not constitute a recurrence of disability.

J.J. v. Bureau of Prisons,**Fairton, NJ**

(Docket # 09-982, on the Web at www.dol.gov/ecab/decisions/2010/Jan/09-0982P.htm) involved an employee who sustained a head injury as a result of an altercation with a co-worker. The employing agency controverted the claim on the grounds of willful misconduct. OWCP denied the claim, finding that the evidence supported that the cause of employee's injury was his own misconduct, because he continued to display inappropriate behavior towards his co-worker despite numerous warnings from his supervisor. OWCP concluded that this conduct removed him from the performance of duty. The Board affirmed the decision, concluding that the employee "engaged in willful misconduct not only in his actions immediately prior to the fight but in his persistent conduct throughout the day….His general conduct and instigation of a fight that was likely to have injurious consequences removed him from the performance of duty."

A.S. and the Portsmouth Naval Medical Center

http://w w.dol.gov/ecab/decisions/2009/Nov/09-1004.htm The Board has recognized an exception where the evidence proves error or abuse in the administrative matter, but appellant has submitted no such proof. Appellant's perception that the investigator did not adequately do his job is not sufficient to establish error in the investigation of her complaints. There is no independent or reliable evidence to support that the investigator committed any administrative error. Even accepting appellant's description of his demeanor as nonchalance, this does not support a finding of abuse.

S.C. and the Nevada National Guard, Docket 09-0913

A case dealing with the issue of who is the official custodian of FECA case files, including files maintained by the agency, made its way to ECAB. http://www.dol.gov/ecab/decisions/2009/Oct/09-0913.htm involves a case that was denied by OWCP, and a hearing was requested. The employee's attorney asked the Hearings Representative to subpoena the agency for a copy of their files. The Hearing Representative advised the attorney that, by statute, OWCP, not the employing establishment, was custodian of appellant's workers' compensation claim file, and that if the employee (or the employee's representative) wanted a copy all the attorney needed do was file a request with OWCP. The Hearings Representative therefore denied the request for a subpoena, and ECAB affirmed that decision, finding that "As appellant has not shown that the personnel records in question cannot be obtained by other means, the Board finds that the hearing representative did not abuse her discretion in denying appellant's request for a subpoena."

EEOC & FECA

The EEOC has said that an employing agency has the right to represent its position and interest in the OWCP forum. As a general rule, it does not review decisions that require it to judge the merits of a workers' compensation claim, but will consider whether the way the agency processed a workers' compensation claim constituted harassment.

Employers may ask disability-related questions and require medical examinations of an applicant only after the applicant has been given a conditional job offer.

Search EEO decisions at: http://www.eeoc.gov/federal/decisions.cfm

Jurisdiction issue

Stephanie Schneider v. USPS 05A01065 08-16-02

A review of applicable case law reveals that, in one instance, an employee was allowed to pursue a claim against the agency for allegedly intentionally depriving him of the opportunity to present a disability claim to OWCP when it failed to process his FECA claim for nearly two years. Grichenko v. USPS, 524 F.Supp. 672 (E.D.N.Y. 1981), aff'd without opinion, 751 F.2d 368 (2nd Cir. 1984). Nevertheless, the Circuit Court subsequently clarified that decision, stating that because the employee was deprived of the opportunity to present a claim to OWCP, the conduct in question foreclosed the employee's administrative remedies such that the protections afforded by FECA were not available.

"…OWCP has exclusive jurisdiction over claims for compensation under FECA. Further, the Commission has no jurisdiction over OWCP with regard to the processing of FECA claims, or decisions to grant or deny benefits."

Settlement language referencing FECA claim in:
Carol Chostner v. Dept. of Navy, Appeal No. 0120064093

Agency Nos. DON(MC) 03-00681-003 & 04-67895-005

Employee refuses to provide relevant medical documentation.

Concordia D. Tindal v. USPS (2009)
Appeal No. 0120071135 Agency No. 1F955000606

After a careful review of the record, the Commission finds that the grant of summary judgment was appropriate, as no genuine dispute of material fact exists. We find that the AJ's decision properly referenced the appropriate regulations, policies, and laws. In the present case, complainant was placed in light duty status for over a year as a result of a traumatic injury she suffered. In January 2000, complainant provided two statements from her doctor, one stating that she could not push, pull, stoop, bend, sit, twist, walk or use her right or land hand moderately or intermittently and another letter stating that she could not perform the same tasks repetitively. On January 21, 2000, the agency terminated complainant's light duty assignment based on the severity of her restrictions. The record reveals that the agency subsequently requested updated medical documentation on March 7, 2000, and April 3, 2000, to determine if there was work available within her restrictions. Complainant failed to respond to both requests and was subsequently issued a Notice of Removal. We find that there was nothing improper about the agency's action in this regard as an agency is permitted to request medical documentation from employees in this situation, and is not required to provide an accommodation if the employee refuses to provide the relevant medical documentation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915.002 at question 6 (Oct. 17, 2002). Although complainant claims that she provided updated medical documentation to the OWCP, we note that the record does not show that complainant provided the medical information directly to the agency as instructed.

Note: Complainant may file a recurrence of her injury, a claim for compensation, or a new claim, but medical will need to address the change in restrictions. In some cases an LWEC loss of wage earning capacity would have been done by this time verifying that she had demonstrated earning ability. Injury Compensation Specialist or ICPA should be made aware of the circumstances in order to share this info with OWCP and challenge claims if necessary.

Reviewing a claimant's injury compensation file before making a position selection.

Juanita L. Green-Collins v. Department of the Interior

Appeal No. 01200611251 Agency No. WBR05039

The Commission has specifically found that an employer may not ask applicants about their job-related injuries or workers' compensation history before providing an applicant with a conditional job offer. (1995 Enforcement Guidance). Here, the SO acknowledged that he reviewed complainant's injury record prior to making his selection for the position at issue, an action which violated the Rehabilitation Act.

…although the SO claims that he did not consider complainant's injury record when making his selection, the record shows that complainant's team leader and supervisor discussed complainant's injury record and light duty history with the SO. We find that, because the agency's legitimate, nondiscriminatory reason for not selecting complainant for the position at issue is predicated on the negative statements of these two management officials, without their affidavits, the record is not sufficiently developed such that a fact-finder could determine whether the agency's articulated reasons are a pretext for unlawful sex discrimination. Further, this evidence is needed to determine the extent to which the SO's prohibited inquiry into her injury record influenced his selection decision. Accordingly, the agency is directed to supplement the record with these affidavits. The agency also is advised that failure to provide the information requested may cause the Commission to draw an adverse inference against the agency with respect to any information not provided. See 29 C.F.R. § 1614.108.

Based on a thorough review of the record and for the reasons stated above, the Commission finds that the agency violated the Rehabilitation Act. The Commission further finds that the agency failed to sufficiently develop the record with regard to complainant's non-selection for the Electrician, Power Systems position. Accordingly, it is the decision of the Commission to reverse the agency's final decision with respect to claim (2), and to vacate the agency's final decision with respect to claim (1) and to remand claim (1) to the agency for further processing in accordance with this decision and the Order below.